United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 17, 1997

TO : Victoria E. Aguayo, Regional Director
Region 21

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Guess?, Inc. 177-1650
Cases 21-CA-31807, 21-CA-31859 524-0133-6200

Case 21-CA-31807 was submitted for advice as to whether Guess?, Inc. (the Employer) violated (1) Section 8(a)(3) by canceling contracts with various subcontractors that sew its garments, because of the union activities of the contractors' employees and in order to quell the union activities of its own employees, and/or (2) Section 8(a)(1) by announcing to the press that it was moving its sewing work to Mexico to avoid and in retaliation for the contractors' employees' union activities.[1] Case 21-CA-31859 was submitted for advice as to whether the Employer violated Section 8(a)(3) by disciplining employee Hilda Castaneda for refusing to participate in an investigatory interview unless an employee witness was present. The facts of both cases are presented in detail in the Region's submission.

[*FOIA Exemptions* 2 and 5

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,] the Employer violated Section 8(a)(3) by discriminatorily terminating contracts with entities with which it was involved in an integrated garment production effort, and thereby causing the layoff of contractor employees. We further conclude that the Employer violated Section 8(a)(1) by threatening to cancel subcontracts in retaliation for union activity. Finally, we conclude that

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[1] This case was also submitted as to the propriety of Section 10(j) injunctive relief. That issue will be addressed in a separate memorandum.

the Employer violated Section 8(a)(1) by suspending employee Castaneda when she refused to participate in an investigatory interview without an employee witness present.

A. Case 21-CA-31807

1. Section 8(a)(3) allegation

The Region has found, and we agree, that there is sufficient evidence to establish that the Employer's cancellations of its agreements with various sewing contractors were motivated by anti-union considerations, rather than economic considerations as contended by the Employer. Therefore, this case squarely presents the question of whether the Employer was privileged to cancel those contracts under Malbaff Landscape Construction.[2] We also agree with the Region that this case is not governed by Dews Construction[3] or Esmark, Inc.,[4] in that the Employer neither directly laid off the contractors' employees nor instructed the contractors to terminate or lay off employees. Rather, the Employer merely cancelled its agreements with the contractors, which in turn caused the contractors to lay off their employees for lack of work. Thus, the Employer's actions ordinarily would be privileged under Malbaff.

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[2] Local 447, Plumbers (Malbaff Landscape Construction), 172 NLRB 128 (1968). In Malbaff, the Board overruled its decision in Northern California Chapter, AGC (St. Maurice, Helmpkamp & Musser), 119 NLRB 1026, 1029-1032 (1957), enfd. 266 F.2d 905 (D.C. Cir. 1959), and found that an employer does not unlawfully discriminate against employees, within the meaning of Section 8(a)(3), by ceasing to do business with another employer because of the union or nonunion activity of the latter's employees.

[3] 231 NLRB 182, n. 4 (1977), enfd. mem. 99 LRRM 2633 (3d Cir. 1977).

[4] 315 NLRB 763, 767-69 (1994).

However, in Whitewood Maintenance[5] the Board held that Malbaff does not apply where the entities engaged in a business relationship are joint employers of the employees. Joint employers may not terminate agreements with one another with an anti-union motivation. The Division of Advice has obtained some information indicating that a joint employer relationship existed between the Employer and its sewing contractors.[6] For example, there have been affidavits and documents filed in cases under the FLSA and state statutes that indicate a high degree of supervision and control by the Employer over its contractors' production process, including daily on-site involvement with directly supervising contractor employees and issuance of numerous written instructions on how employees should perform specific production tasks. Moreover, pursuant to a settlement entered into by the Employer and the Department of Labor, and in order to forestall the DOL's seizure of Guess-owned "hot goods" (goods made without compliance with the FLSA) from the contractors, the Employer entered into a Model Agreement that requires its substantial involvement in the contractor employees' terms and conditions of employment. Specifically, the Agreement requires that the Employer guarantee payment of the minimum wage, and that it insure, through daily monitoring, that its contractors' hours and working conditions are as required by the FLSA. In view of the substantial degree of control that the Employer appears to have over the working conditions of its contractors' employees and the commercial reality of the business relationships, there may be evidence of actual or potential control over other working conditions (e.g.,

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[5] Whitewood Maintenance Co., 292 NLRB 1159, 1164 (1989).

[6] In its charge, the Union of Needletrades, Industrial & Textile Employees (the Union) did not allege that the Employer and its contractors were joint employers, and the Union has to date refused the Region's request to expand the investigation to include a joint employer analysis. However, in telephonic communications with Division of Advice staff, the Union's counsel has stated that the Union no longer objects to a joint employer theory of liability.

discipline) which could be developed through an investigation.[7]

[*FOIA Exemptions* 2 and 5

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[*FOIA Exemptions* 2 and 5

,] the Region should proceed with a Section 8(a)(3) complaint on the theory that the unique relationships in the garment industry are such that, even absent a showing of a joint employer relationship, Malbaff does not privilege the Employer's discriminatory cancellation of its subcontracts.[9] Thus, the Region should argue that Malbaff should not apply because the Employer and its sewing contractors were not truly "independent" entities.[10] In this regard, crucial to the Board's analysis in Malbaff was its disavowal of its

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[7] See Airborne Express, Cases 1-CA-32742, 32767, Advice Memorandum dated February 14, 1997, for a discussion of the General Counsel's current approach to joint employer determinations.

[8] [*FOIA Exemptions* 2 and 5

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[9] [*FOIA Exemptions* 2 and 5

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[10] The Board has been willing to limit the holding of Malbaff in other contexts, finding that it does not apply where, instead of canceling an agreement for anti-union reasons, an employer directs another employer with which it has a business agreement to discharge or otherwise affect the working conditions of the latter's employees because of their union activities. See Dews Construction, supra, and Esmark, supra.

earlier view, espoused in Musser, that a general contractor necessarily has "control" over its subcontractors' employees. The Board stated that "the entire body of law concerning secondary activities at construction sites is grounded upon the independence of general contractors and subcontractors from one another which establishes one or the other as a secondary or neutral employer . . . " 172 NLRB at 129. Implicit in the Board's rationale is the view that, where employers are not entirely independent, the cancellation of a business relationship for discriminatory reasons might implicate Section 8(a)(3).

Because of the structure of the garment industry, a jobber (Guess) and its contractors should not be considered "independent" entities entitled to cancel, for anti-union reasons, their contractual agreements. The jobber is heavily involved in supervising the way in which work is performed on the garments it continues to own throughout the process. More important, the contractors are completely economically dependent upon the jobber. They are only in business because of the jobber's decision to use "outside" rather than "inside" sewers, and often work for only one jobber, which can eradicate the contractor's entire business by switching to a cheaper contractor. In the legislative history of the garment industry proviso to Section 8(e), Congress discussed the unique "integrated production effort" engaged in by jobbers and contractors in this industry and the sweatshop conditions that had prevailed as a result, and would certainly prevail again, were unions to be precluded from picketing to obtain agreements requiring that jobbers do business only with unionized contractors.[11] Based upon these relationships, Congress expressly concluded that jobbers and contractors, unlike construction industry contractors who were given similar protections under Section 8(e), are not neutrals vis-a-vis one another under Section 8(b)(4). Consistent with the concerns underlying that determination, jobbers should not be able to evade liability under Section 8(a)(3) when they terminate contracts, for anti-union reasons, and

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[11] See discussion of the legislative history of the garment industry proviso in Joint Board of Coat, Suit, and Allied Garment Workers (Hazantown, Inc.), 212 NLRB 735 (1974); R.M. Perlman v. N.Y. Coat, Suit, Union Local 89-22-1, 33 F.3d 145 (2d Cir. 1994).

the necessary, foreseeable result is the loss of contractor employee jobs.

2. Section 8(a)(1) allegations

The Region's complaint also should allege that the Employer violated Section 8(a)(1) by announcing to the press that it planned to relocate its sewing work to Mexico at least in part because of the Union's and contractors' employees' protected activities of reporting FLSA violations at the contractors' facilities. [*FOIA Exemptions* 2 and 5 ,] its threats to discriminatorily cancel business agreements, which would lead to the termination of those employees, violated the Act. [*FOIA Exemptions* 2 and 5 ,] the Employer's statements in the press were likely to restrain and coerce the contractors' employees because of the tangible effect the Employer's cancellation of contractor agreements necessarily would have on contractor employee jobs.[12]

In addition to this Section 8(a)(1) allegation, as to which the Region has expressly sought advice, there is a meritorious allegation that the Employer violated Section 8(a)(1) through the threats by various contractors to their employees, in the Fall of 1996, regarding potential terminations of contracts by the Employer, and corresponding job losses, should the employees engage in union activities.[13] There is evidence that the Employer was

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[12] See Fabric Services, 190 NLRB 540 (1971) (rejecting application of Malbaff to Section 8(a)(1)). [*FOIA Exemptions* 2 and 5 .]

[13] See statements discussed in the Region's Request for Advice at pp. 5-7. The current charge, filed on January 15, 1997, which asserts that the Employer violated Section 8(a)(1) by "threatening to move its production to Mexico

the source of those threats, which were specifically attributed to it by the contractors, were almost identical in nature at six different contractor facilities, and were consistent with the Employer's threats to Guess employees. If the Employer was a joint employer of the contractors' employees, those statements were unlawful threats by the Employer to its own employees. Even if the Employer was not a joint employer of the contractors' employees, the statements would have restrained and coerced those employees from engaging in union activities.[14]

B. Case 21-CA-31859

The Region should issue a complaint alleging that the Employer violated Section 8(a)(1) by suspending employee Castaneda because she refused to meet with her supervisor for an investigatory interview without another employee present.[15] Thus, consistent with the General Counsel's position as set forth in Epilepsy Foundation of Northeast Ohio,[16] we conclude that offering a Weingarten right to unrepresented employees is necessary to protect concerted activity for mutual aid and protection, and is consistent with the long-recognized protections afforded by Section 7 to other types of concerted action by unrepresented employees. [*FOIA Exemptions* 2 and 5
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and elsewhere outside the United States," would reach this allegation.

[14] See Fabric Services, supra.

[15] The Region has concluded that Castaneda was suspended for refusing to speak with her supervisor without a witness present, and not for using the microwave prior to the start of the lunch period. Therefore, the Union's evidence of the Employer's disparate treatment of employees engaged in similar microwave use would not establish a violation of Section 8(a)(3).

[16] Case 8-CA-28169, Advice Memorandum dated October 22, 1996.

[17] [*FOIA Exemptions* 2 and 5 .]

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Accordingly, the Region should [*FOIA Exemptions* 2 and 5] and issue a complaint, absent settlement, consistent with the foregoing.

B.J.K.

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[18] [*FOIA Exemptions* 2 and 5 .]